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FILED

JUN 30 2000

CLERK

No. 99-1930

In The

# Supreme Court of the United States

SCOTT ALBERS,

*Petitioner,*

vs.

MONTANA SUPREME COURT,

*Respondent.*

**On Petition For Writ Of Certiorari To The Montana Supreme Court**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I.

Whether the Court lacks jurisdiction to issue the writ because of the untimely filing of the petition.

II.

Whether the record shows that the Montana attorney disciplinary system does not combine prosecutorial and adjudicative functions.

III.

Whether the record shows that Petitioner received full procedural due process.

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## CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the Montana Supreme Court is reported in *Goldstein and Albers v. Commission on Practice*, 2000 MT 8, 297 Mont. 493, 995 P.2d 923 (2000) (hereinafter *Goldstein and Albers*).

## BASIS OF JURISDICTION

Petitioner contends the Court's jurisdiction arises from 28 U.S.C. § 1257(a). Whether his petition is timely depends on 28 U.S.C. § 2101(c).

## CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amd. XIV, § 1.

## STATEMENT OF THE CASE

By Formal Complaint dated January 7, 1998, Special Counsel charged Petitioner with three violations of the Montana Rules of Professional Conduct:

(1) recklessly swearing as part of a judicial disqualification motion that the presiding trial judge had ex parte contact with the attorneys who were prosecuting Petitioner's client,

(2) submitting an ex parte recusal demand to the presiding judge just days after a different judge had ruled that the presiding judge should *not* be disqualified, and

(3) a pattern of conduct based on the first two counts.

Reg. 01/8/98[1].

Before the formal hearing, Petitioner received the following additional notice of the charges against him and the nature of the evidence to be presented in support of those charges:

* Special Counsel's detailed response to Petitioner's motion before the Commission on Practice for a more definite statement of the charges or, alternatively, to dismiss. Reg. 02/17/98.

* Special Counsel's identification of persons with relevant knowledge. Reg. 05/04/98.

* Special Counsel's summary of information believed to be known by various witnesses and identification of exhibits. Reg. 5/18/98.

* Special Counsel's detailed response to Petitioner's motion before the Montana Supreme Court to dismiss or compel discovery. Reg. 05/29/98.

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[1] The Montana Supreme Court's Register of Action (hereinafter "Reg.") indicates the various actions by date rather than number.

* Depositions by Petitioner's counsel of the three principal witnesses. *Goldstein and Albers*, 297 Mont. at 504, ¶41, 995 P.2d at 930, ¶41.

* Special Counsel's responses to five of Petitioner's contention interrogatories. Reg. 09/23/98.

* Special Counsel's pre-hearing submission of proposed findings of fact and conclusions of law. Record at 11.

The Commission on Practice conducted a formal hearing into the charges against Petitioner on October 1, 1998. Record. During this hearing the Commission heard witness testimony and received exhibits. *Id.*

On January 13, 1999, the Commission on Practice filed its proposed Findings of Fact, Conclusions of Law, and Recommendation to the Montana Supreme Court. Reg. 01/13/99. Petitioner filed written objections to the Commission's findings, conclusions, and recommendation. Reg. 03/5/99.

The Montana Supreme Court consolidated Petitioner's constitutional objections with similar objections lodged in a separate disciplinary proceeding by attorney Morton B. Goldstein. Reg. 04/27/99. On October 27, 1999, the Montana Supreme Court heard oral argument from Petitioner, Mr. Goldstein, Special Counsel, and several amici curiae. Reg. 10/27/99.

The Montana Supreme Court rejected Petitioner's and Mr. Goldstein's constitutional arguments in the written decision below. Reg. 01/13/00 (published as *Goldstein and Albers, supra)*. As part of that decision, the court held that its *sua sponte in camera* review of the Commission's

files on Mr. Goldstein and Petitioner did not reveal any exculpatory evidence. *Id.*, 297 Mont. at 504-505, ¶44, 995 P.2d at 931, ¶44.

Petitioner moved for rehearing of the *Goldstein and Albers* decision. Reg. 02/03/00. The Montana Supreme Court denied that motion on February 8, 2000. Reg. 02/08/00; App. 84-85 to petition. That order described the issues raised in the motion for rehearing as "res judicata." *Id.* It held that the Montana Supreme Court would "not entertain any further motions concerning discovery of the Commission on Practice file." *Id.* On February 15, 2000, the court denied Mr. Goldstein's petition for rehearing. Reg. 02/15/00; App. 89-90 to petition.

On February 18, 2000, the Montana Supreme Court adopted the findings, conclusions, and recommendations of the Commission on Practice. Reg. 02/18/00. The court directed Petitioner to appear before it for public censure on March 21, 2000. *Id.* It also directed him to pay the cost of the proceedings against him. *Id.*

Petitioner paid the cost of the proceedings on March 21, 2000. Reg. 3/21/00. That same day, he appeared for and received a public censure from the Montana Supreme Court. App. 95-97 to Petition.[2]

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[2] The Register of Action indicates "3/22/00" for the public censure because that was the date the clerk placed a written copy of the censure in the file. The actual censure proceeding before the Montana Supreme Court occurred on March 21, 2000.

## REASONS FOR DENYING THE WRIT

### A. The Court Lacks Jurisdiction To Issue the Writ Because the Petition is Untimely.

A petition for certiorari must be filed within 90 days after entry of the judgment or decree at issue. 28 U.S.C. § 2101(c). "This 90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). A state-court judgment or decree becomes final, within the meaning of 28 U.S.C. § 1257(a), when the state court completes its consideration of any federal constitutional issues and no further state review of the federal issue is possible. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975).

The Montana Supreme Court completed its consideration of the federal constitutional issues no later than February 15, 2000 when it denied Mr. Goldstein's petition for rehearing. Reg. 2/15/00; App. 89-90 to petition. Arguably, Petitioner's own time began to run even earlier (February 8) when the Montana Supreme Court denied his own motion for rehearing. Reg. 2/8/00; App. 84-85 to petition. That order described the constitutional issues as "res judicata," thereby foreclosing any further state-court review of those issues. *Id.* Therefore, Petitioner had until May 8, 2000 to file his petition for certiorari. Under no circumstances did he have longer than May 15, 2000 – 90 days after the denial of Mr. Goldstein's petition for rehearing.

This is consistent with Petitioner's own admissions before this Court. In his motion to this Court for an extension of time, Petitioner represented that the time within which he was required to petition for certiorari began running on February 15, 2000. Consequently, he

argued, his petition would be due on or before May 15, 2000. On May 8, 2000, Justice O'Connor denied Petitioner's motion for an extension of time.

Petitioner then filed his petition for certiorari on May 16, 2000. By letter dated May 24, 2000, the clerk initially rejected and returned the petition as untimely. The clerk has apparently reconsidered that action.

Under Petitioner's own analysis, the petition is untimely. If his time to petition for certiorari started to run on February 8, 2000, when the Montana Supreme Court denied his petition for rehearing and described the issues raised in that petition as "res judicata," it ran out on May 8, 2000. If the time started to run on February 15, 2000, when the Montana Supreme Court denied Mr. Goldstein's motion for rehearing, it ran out on May 15, 2000. Either way, Petitioner's May 16, 2000 petition for certiorari is untimely and the Court has no jurisdiction to consider it. 28 U.S.C. § 2101(c); *Jenkins*, 495 U.S. at 45.

**B. The Record Shows That the Montana Attorney Disciplinary System Does Not Combine Prosecutorial and Adjudicative Functions in One Body.**

**1. This Issue is Not of Nationwide Significance Because the System Petitioner Attacks is Unique to Montana.**

Significantly, the authority upon which Petitioner relies describes Montana as *the only* jurisdiction in the United States to adopt the attorney disciplinary system he now attacks. *Id.*, 297 Mont. at 509, ¶61, 995 P.2d at 934, ¶61 (Nelson, J., dissenting) (quoting ABA Report). Because the Montana system is unique, the Montana

Supreme Court's application of federal law to the Montana system does not "conflict with the decision of another state court of last resort or of a United States court of appeals." Therefore this issue does not involve "an important federal question" within the meaning of Supreme Court Rule 10(b).

**2. Neither the Record Nor the Decision Below Raise the "Intermingling" Question Petitioner Seeks to Present.**

The Montana Constitution makes the Montana Supreme Court ultimately responsible for attorney discipline. Mont. Const. art. VII, § 2(3). The Montana Supreme Court has created a Commission on Practice to make nonbinding recommendations to the court on disciplinary matters. *Goldstein and Albers*, 297 Mont. at 497-498, ¶¶ 8-17, 995 P.2d at 926-927, ¶¶ 8-17.

The Montana Supreme Court reviews proceedings before the Commission *de novo*. *Id.*, 297 Mont. at 501, ¶30, 995 P.2d at 929, ¶30. The Montana Supreme Court retains final, plenary power to decide the facts, to determine whether disciplinary violations have occurred, and to determine what discipline, if any, will be imposed. *Id.*, 297 Mont. at 500, ¶26, 995 P.2d at 928, ¶26.

Therefore Petitioner's fundamental premise is wrong: the Montana system does *not* combine the prosecutorial and adjudicative functions in one body. The Montana Supreme Court explicitly rejected the argument that the Montana system combines prosecutorial and adjudicative functions. *Goldstein and Albers*, 297 Mont. at 498-499, ¶¶ 20-22, 995 P.2d at 927, ¶¶ 20-22.

Because the Montana Supreme Court found no unconstitutional intermingling of functions, it did not, as Petitioner argues, rely on *Withrow v. Larkin*, 421 U.S. 35 (1975), to support the constitutionality of such a combination of functions. The Montana Supreme Court cited *Withrow* only to show that the Montana system provides attorneys *more* protection than the Wisconsin system this Court approved in *Withrow*. *Goldstein and Albers*, 297 Mont. at 500, ¶26, 995 P.2d at 928, ¶26. The Montana Supreme Court explained that in *Withrow*, an administrative agency not only combined prosecutorial and administrative functions but also had the power to suspend a physician's license. *Id.* In Montana, by contrast, the Commission on Practice can only recommend. *Id.* Its recommendations are not binding on the Montana Supreme Court. *Id.* The Commission cannot suspend or disbar an attorney – the Montana Supreme Court retains that power for itself. *Id.*

The system Petitioner attacks is unique to Montana. No other jurisdiction uses it. It does not combine prosecutorial and adjudicative functions and therefore does not depend on the *Withrow* case. The first of Petitioner's two questions is therefore without merit.

### C. The Record Shows That Petitioner Received Full Procedural Due Process.

#### 1. The Discretionary Discovery and Evidentiary Rulings of the Montana Commission on Practice Do Not Present an "Important Federal Question."

The second of Petitioner's two issues effectively invites this Court to overturn discretionary discovery and evidentiary rulings of the Montana Commission on Practice. Whether stated as a complaint about access to the Commission's file, or as a complaint about the exclusion on relevance grounds of alleged misconduct by the presiding judge and other attorneys at other times, this second issue necessarily implicates the discretion of the Commission on Practice. Moreover, the Montana Supreme Court has amended the rule about which Petitioner now complains. Petition at 14 (citing March 14, 2000 amendment to Rule 13A, Mont. Rules for Lawyer Disc. Enf.).

Consequently, a writ of certiorari on this point could benefit only Petitioner. This Court's review of these discretionary rulings, which are fact-specific and of a type traditionally left to the discretion of the lower court, would be of little or no precedential value to federal and state courts outside Montana. Consequently these rulings do not present "an important federal question" within the meaning of Supreme Court Rule 10(b).

### 2. Petitioner Was Not Surprised by the Changes or the Evidence Presented Against Him.

Significantly, Petitioner does not claim to have been surprised by the changes or the evidence presented against him. Therefore *In re Ruffalo*, 390 U.S. 544 (1968), is inapposite. *Ruffalo* holds only that an attorney who faces disciplinary proceedings is entitled to fair notice of the charges and an opportunity to be heard. *Ruffalo*, 390 U.S. at 550. It does not hold that the attorney is entitled to unbridled discovery. As is described more fully in Respondent's Statement of the Case, Petitioner took three depositions, received detailed answers to five of his contention interrogatories, forced Special Counsel to respond to two motions to dismiss, and received Special Counsel's proposed findings of fact and conclusions of law. Clearly Petitioner received fair notice of the charges and an opportunity to be heard. Under *Ruffalo*, this was all that due process required.

### 3. The Commission's File Does Not Contain Any Exculpatory Evidence.

The Montana Supreme Court, exercising its plenary power as trier of fact, inspected the Commission's file *in camera*. *Goldstein and Albers*, 297 Mont. at 504-505, ¶44, 995 P.2d at 931, ¶44. The majority held that the file did *not* contain exculpatory evidence. *Id.* The dissenting justices disagreed with this procedure but not with the majority's conclusion that the file contained no exculpatory evidence. *Id.*, 297 Mont. at 524, ¶96, 995 P.2d at 943 (Nelson, J., dissenting); 297 Mont. at 534, ¶133, 995 P.2d at 949, ¶133 (Trieweiler, J., dissenting). Therefore the record

flatly contradicts Petitioner's speculation that he was deprived of exculpatory evidence.

### 4. It Was Within the Commission's Discretion to Exclude Irrelevant Evidence.

Throughout the proceedings against him, Petitioner has tried to shift attention away from himself by complaining about the acts of other people at other times. The Commission, exercising its discretionary power over discovery and evidence questions, Rules 9C and 12D, Mont. Rules for Lawyer Disc. Enf., held that the motive and conduct of others was irrelevant. *See, e.g.*, Record at 90.

This was within the Commission's discretion. Alleged unethical actions by other people at other times would not have made the charges against Petitioner any more or less likely. *In re Meck*, 200 N.E. 478 (Oh. App. 1935) (syllabus); *Sullins v. State Bar*, 542 P.2d 631, 636 (Ca. 1975); *State v. Turner*, 538 P.2d 966, 972 (Kan. 1975); *In re Rothman*, 97 A.2d 621, 630 (N.J. 1953). Conduct by the presiding judge that occurred *after* Petitioner's sworn affidavit of bias (i.e., information Petitioner did not have when he swore to the affidavit) would not have made that sworn accusation any less reckless. *Matter of Atanga*, 636 N.E.2d 1253, 1257 (Ind. 1994); *In re Kelly*, 808 F.2d 549, 551 (7th Cir. 1986). It was within the Commission's discretion to exclude that evidence. This Court should decline to use its certiorari power to review such a discretionary ruling.

## CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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